UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

June 5, 1996

UNITED STATES OF AMERICA, Complainant	)	
	)	8 U.S.C. 1324a Proceeding
vs.	)	
	)	OCAHO Case No. 95A00056
FOUR STAR KNITTING, INC., Respondent	)	

FINAL DECISION AND ORDER

Appearances: D. Reeves Carter, Esquire, Immigration and Naturalization Service, United States Department of Justice, New York, New York, for complainant; Henry Kohn, Esquire, Brooklyn, New York, for respondent.

Before: Administrative Law Judge McGuire

Procedural History

On March 31, 1995, the United States Department of Justice, Immigration and Naturalization Service (complainant or INS), filed a three (3)-count Complaint Regarding Unlawful Employment, in which it alleged that subsequent to November 6, 1986, respondent had committed some 135 paperwork violations of the Immigration Reform and Control Act (IRCA) of 1986, 8 U.S.C. § 1324a, for which civil money penalties totalling $41,000 were assessed.

Count I of the Complaint alleged that respondent had failed to prepare and/or make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for the 46 individuals listed therein, in violation of 8 U.S.C. § 1324a(a)(1)(B). Civil money penalties of $300 were levied for each of 44 of those alleged infractions and $440 for each of the remaining two (2) violations, for a total of $14,080.

In Count II, complainant charged that respondent had failed to ensure that the 85 listed employees had properly completed Section 1 of their Forms I-9, and also that respondent had failed to properly complete Section 2 of those same forms, thus violating the provisions of 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties totalling $25,920 for that count, or $300 for each of 82 of those infractions and $440 for each of the remaining three (3) alleged violations.

Count III alleged that respondent had failed to ensure that the four (4) employees listed in paragraph A had properly completed Section 2 of their Forms I-9, again in violation of 8 U.S.C. § 1324a(a)(1)(B), and sought civil money penalties totalling $1,000, or $250 for each of those four (4) alleged infractions.

On September 1, 1995, following the commencement of discovery activities, the undersigned issued an Order Granting Complainant's Motion to Deem Admitted Complainant's First Request for Admissions and Staying Complainant's Motion for Summary Decision.

On November 7, 1995, the undersigned issued an Order Denying Respondent's Motion to Reconsider and Partially Granting Complainant's Motion for Summary Decision, in which summary decision was granted as to the facts of violation asserted in 133 of the 135 alleged violations of IRCA, 8 U.S.C. § 1324a(a)(1)(B) and, with the exception of the two (2) alleged facts of violation pertaining to Matilda Romero and Lorenza Sanchez in Count II, fully adjudicated all facts of violation alleged in the Complaint. The parties were invited to submit concurrent briefs addressing the appropriate penalties to be assessed for those 133 proven infractions.

On November 28, 1995, complainant filed a Motion for Approval of Complainant's Request for Civil Money Penalties, in which it reasserted the appropriateness of its prior $41,000 civil money penalty assessment.

On December 8, 1995, respondent filed a Motion for Denial or Reduction of Complainant's Request for Civil Money Penalties, requesting that the undersigned either deny complainant's request for civil money penalties totalling $41,000, or that all civil money penalties be reduced to the statutory minimum of $100 for each of the violations, resulting in the imposition of civil money penalties totalling $13, 300 for the 133 violations ruled upon in the November 7, 1995 Order.

On March 7, 1996, complainant filed a Motion to Deem Admitted Complainant's Second Request for Admissions and Motion for Summary Decision, which addressed the two (2) remaining facts of violation at issue, specifically, those regarding Matilda Romero (Romero) and Lorenza Sanchez (Sanchez) in Count II of the Complaint. Complainant stated in that motion that on January 30, 1996, it had served upon respondent's attorney, Mr. Henry Kohn, a copy of Complainant's Second Request for Admissions, and that Mr. Kohn had failed to respond to those requests in a timely manner. Complainant requested that the undersigned deem those requests for admissions to have been conclusively admitted, in accordance with the pertinent procedural rule, 28 C.F.R. § 68.21(b) (1995).

On April 1, 1996, the undersigned issued an Order Granting Complainant's Motion to Deem Admitted Its Second Request for Admissions and Its Motion for Summary Decision concerning the facts of violation in those two (2) remaining alleged violations concerning Romero and Sanchez, resulting in complainant having been granted summary decision as to all 135 paperwork violations contained in Counts I, II and III of the March 31, 1995 Complaint. The parties were again invited to submit concurrent briefs recommending the appropriate civil money penalties to be imposed for those two (2) violations.

On April 23, 1996, complainant submitted a pleading captioned Complainant's Motion for Approval of Requested Civil Money Penalties, advising that in view of the fact that "[t]he violations pertaining to Matilda Romero and Lorenza Sanchez are substantially similar, in part or in whole, to the violations of the other 133 violations cited in the Complaint . . . the Service relies on its previously submitted Motion . . . in support of the civil money penalties assessed against Respondent." Apr. 23, 1996 Mot. at 2.

Determination of the Appropriate Civil Money Penalties

Statutorily Mandated Factors

IRCA expressly mandates that five (5) factors be considered in determining the appropriate civil money penalties to be imposed for paperwork violations:

> With respect to a [paperwork] violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. § 1324a(e)(5).

1. Size of Business

According to § 1324a(e)(5), the size of respondent's business is the initial statutory factor which must be considered when determining an appropriate penalty. Neither IRCA nor its implementing regulations, however, provide clear-cut definitions of what constitutes "size of the business." See United States v. Tom & Yu, Inc., 3 OCAHO 445, at 4 (1992). Nonetheless, to ascertain the size of a business, previous OCAHO rulings have considered respondent's revenue or income, the size of its payroll, the number of its salaried employees, the nature of its ownership, the length of time it has been in business, and the nature and scope of its business facilities. United States v. Felipe, Inc., 1 OCAHO 93, 632 (1989).

Complainant has not commented upon the size of respondent's business.

Respondent, however, contends that "[t]he size of business of an employer is a highly relevant factor to consider" because "the purpose of the . . . penalty is to induce, through a legally proportioned fine, compliance with a [sic] immigration law that applies . . . to all employers. For,

it is not the intent of the IRCA to put people out of business as a result of the payment of fines, but to seek compliance of its regulations." Mot. Denial Reduction Complainant's Req. Civil Money Penalties at 2 (citing United States v. Felipe, Inc., 1 OCAHO 93 (1989)).

Respondent maintains that its has "sustained continuous losses due to lagging sales" over the past three (3) years, and offers in support of that statement the affidavit of Leopold Frischman, respondent's vice president. Id. at 2 & Ex. 1 (respondent's balance sheets and income statements for 1992-94 and the first half of 1995). Respondent points out that "[d]uring the course of the past several years, Respondents [sic] have witnessed a consistent disintegration of their business, resulting in their dissolution of the finishing division of their business, which originally comprised [sic] of 40-45 employees." Id. at 2. As a result, respondent has curtailed its business, and currently employs only five (5) to six (6) workers, two (2) of whom are owners. Id. Further, "the two (2) shareholding owners have for extended periods, been unable to draw any salaries due to the cash shortfall. It is of particular importance . . . that during the period ending June 30, 1995, net losses have leaped [sic] to $112,643.00, the highest losses ever recorded by the Respondent." Id. at 2-3. Thus, respondent's counsel urges the undersigned to lessen the penalty to the statutorily-mandated minimum of $100 for each violation.

In light of respondent's current economic woes, and because prior OCAHO decisions have held that businesses larger than 40-45 employees are nonetheless "small," it is fair to characterize respondent as a small business. See United States v. Anchor Seafood Distribs., 5 OCAHO 758, at 5 (1995) (holding that respondent, who employed 93 employees, was a small business); United States v. Vogue Pleating, Stitching & Embroidery Corp., 5 OCAHO 782, at 3-4 (1995) (classifying respondent, who employed about 100 employees, as small). Because respondent is correct in asserting that "the point of the penalty is certainly not to put anybody out of business, or even to cause any substantial economic intrusion on the normal functioning of business decision-making, but to foster required compliance with IRCA through appropriate disincentive mechanisms," the civil money penalty amount will be mitigated based upon the size factor. United States v. Felipe, Inc., 1 OCAHO 93, 631-32 (1989); see also United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 10-11 (1993) (finding that a penalty of $53,000 against respondent, whose annual receipts for the previous year totaled $540,000 was "unduly punitive"); United States v. Camidor Properties, Inc., 1 OCAHO 299, 1980-81 (1991) (reducing the penalty sought by INS in part based upon respondent firm's unstable financial condition).

2. Good Faith of the Employer

The second element to be considered is the good faith of the employer. OCAHO case law has established that mere allegations of paperwork violations do not constitute a lack of good faith for penalty purposes. United States v. Valladares, 2 OCAHO 316, at 6 (1991). In order to demonstrate a lack of good faith on respondent's part, complainant must present some evidence of "culpable behavior [on respondent's part] beyond mere failure of compliance." United States v. Karnival Fashion, Inc., 5 OCAHO 783, at 3 (1995) (as modified). Furthermore, "[a] dismal rate of Form I-9 compliance alone should not be used to increase the civil money penalty sums based upon the statutory good faith criterion." Id. at 4.

Complainant maintains that respondent's conduct under these facts equates to bad faith:

> In a completed questionnaire dated January 8, 1988, Leopold Frischman, the Respondent's vice president, acknowledged that the Respondent had received a copy of the Handbook for Employers (M-274) and an I-9 form and that he was aware of the Respondent's responsibilities under Section 274A of the [INA] . . . Mr. Frischman also indicated that he did not wish to be contacted by an immigration officer for assistance. [citation omitted] The Respondent has also admitted that on December 27, 1993, INS Special Agent Paul Scrivanich showed a blank I-9 form to Mr. Frischman who said that he had never seen the form before and that he had not prepared I-9 forms for the Respondent's employees.
>
> Mr. Frischman's acknowledgment of receipt of a sample I-9 in January 1988 and his later denial of knowledge of the existence of the I-9 constitutes bad faith . . . .
>
> The Respondent has also admitted that it failed to prepare and/or present 46 I-9 forms and that it failed to properly complete 89 additional I-9's [sic] following the arrest of 6 unauthorized aliens on its premises. Such failure represents further evidence of the Respondent's bad faith.

Mot. Approval Complainant's Req. Civil Money Penalties at 1-2.

Respondent disagrees with those allegations of bad faith, noting that "Respondent does not have any records or recollection of ever completing any questionnaire in 1988 or with meeting with any immigration officer prior to the within action." Mot. Denial Reduction Complainant's Req. Civil Money Penalties at 3. Respondent also maintains that bad faith was not manifested by any alleged statements of Mr. Frischman regarding Forms I-9 because "[he] was not the employer involved in the hiring or firing of employees since those duties were performed entirely by his partner, Mr. Schwartz." Id. Thus, any statement attributed to Mr. Frischman concerning Forms I-9 could not evidence bad faith on his part because he was not directly responsible for respondent's compliance with IRCA. Presumably, Mr. Frischman feels that the admitted proscribed conduct of his partner cannot, or should not, be imputed to him.

Respondent also argues that its "many deficiencies in the preparation and completion of many of the I-9's [sic] prepared for its employees . . . was not . . . due to any callous disregard or brazen neglect of its obligations . . . [but] [r]ather same is due strictly due [sic] to absolute misunderstanding, ignorance and mistake." Id. at 4. Respondent's counsel indicates that respondent misunderstood several of IRCA's requirements, namely those mandating that all employees, even owners, must complete Forms I-9; that employers must retain all forms, even if the employee was only with the company for a very short time; and that the employer must retain forms for employees

who have since been terminated. Id. Respondent thus asserts that its failure to comply with IRCA was not due to disdain for the law, but rather to carelessness and ignorance, which cannot be fairly equated with bad faith. Id. at 5 (citing United States v. Big Bear Mkt., 1 OCAHO 48 (1989)).

It is found that respondent has not acted in good faith, and is therefore at the least not entitled to mitigation of the proposed civil money penalties based upon this element, and should have had the proposed civil money penalty sums enhanced based upon this factor.

3. Seriousness of the Violation

The third of the five (5) statutory criteria to be considered involves the seriousness of the violations alleged. Paperwork violations, such as those at issue, while less egregious than a knowing hire violation, are to be considered serious in that they undermine the employment eligibility verification system instituted by Congress. United States v. Eagles Groups, Inc., 2 OCAHO 342, at 3 (1992) ("The principal purpose of the I-9 form is to allow an employer to ensure that it is not hiring anyone who is not authorized to work in the United States"); see also United States v. Mathis, 4 OCAHO 717, at 6 (1995) (as modified); United States v. Reyes, 4 OCAHO 592, at 8 (1994); United States v. Minaco Fashions, Inc., 3 OCAHO 587, at 8 (1993); United States v. Felipe, Inc., 1 OCAHO 93, 636-37 (1989).

Complainant maintains that respondent's admitted failure in Count I to prepare and/or make available for inspection Forms I-9 for 46 of its employees, its failure to ensure in Count II that 85 of its employees properly completed Section 1 coupled with its failure to properly complete Section 2 for those same individuals, plus its failure to insure in Count III that four (4) employees properly completed Section 1 of their Forms I-9, all support a finding that the infractions are serious, and that the penalty should be aggravated based upon this factor.

Respondent contends that "[t]here are various degrees of seriousness" that correspond to the myriad, potentially different ways in which IRCA can be violated. Mot. Denial Reduction Complainant's Req. Civil Money Penalties at 5. Respondent suggests a tiering of seriousness that classifies the most serious violation as an intentional falsification of the Form I-9, followed by a "deliberate refusal to fill out any part of the I-9," the "negligent failure to fill out any part of the I-9," "a violation in which parts of the form are filled out, but [the form] is not signed by either the employer or the employee," and finally, least serious, "a violation in which the employer has signed Part 1 and the employee has failed to sign Part 2 of the form." Id. at 5-6. Thus, respondent urges that its violations, while serious, are relatively less serious than the most egregious IRCA infractions, and that the civil money penalty sums should reflect that fact.

Respondent's counsel next argues that respondent "as evidenced by the annexed affirmation of the respondent, I-9 [sic] were prepared for all of the 46 employees" listed in Count I. Id. at 6. Respondent attaches the "affirmation" of Mr. Frischman, its vice president, in support of that statement. Mr. Frischman states that complainant's allegations regarding respondent's failure to prepare and/or make available for inspection contained in Count I are "totally incorrect inasmuch as, the forms were duly prepared for each of the aforesaid employees, however, the Complainant

failed to allow the Respondent to provide same due to a trivial procedure default of the Respondent." Frischman Aff. at ¶7 (appended to Mot. Denial Reduction Complainant's Req. Civil Money Penalties). However, due to respondent's failure to respond to complainant's July 10, 1995 First Request for Admissions, it has previously been established in the September 1, 1995 Order Granting Complainant's Motion to Deem Admitted Complainant's First Request for Admissions and Staying Complainant's Motion for Summary Decision that respondent firm failed to prepare and/or make available to complainant those 46 Forms I-9, and Mr. Frischman's contradictory statement, totally unsupported by any employment eligibility verification forms or other documentary evidence, is insufficient to overcome that prior admission.

In that posture, the record indicates that respondent failed to prepare and/or make available for inspection the required Forms I-9 for 46 of its employees named in Count I. As the CAHO emphasized in his Modification of United States v. Wu, "'a total failure to prepare and/or present the Forms I-9 is . . . serious since such conduct completely subverts the purpose of the law,' even where no unauthorized aliens are implicated." 3 OCAHO 434, at 2 (1992) (as modified) (quoting United States v. A-Plus Roofing, 1 OCAHO 209, 1402 (1990)).

Respondent further failed to insure that 85 of its employees named in Count II properly completed Section 1 of their Forms I-9, as well as failing to properly complete Section 2 of the same forms. "While an untimely, improper completion may be viewed as marginally less serious than a total failure to prepare Forms I-9, such a failure is nonetheless serious." United States v. Ricardo Calderon, Inc., 6 OCAHO 832, at 4 (1996) (citing United States v. El Paso Hospitality, Inc., 5 OCAHO 737, at 7 (1995) (finding that a failure to complete Section 2 of the Form I-9 within three (3) days was "not as serious as failing to complete a Form I-9, or to ensure the completion of section 1 or to properly complete section 2."); United States v. Chef Rayko, Inc., 5 OCAHO 794, at 10 n.11 (1995) (opinion of administrative law judge) (indicating that "[c]ompletion of section 1 after three days is untimely, but, if accomplished after three days, is a less serious violation than complete failure to comply as to section 2.")).

Therefore those 46 infractions listed in Count I must be considered serious violations under IRCA because they completely undermine the purpose of the law. See Wu, 3 OCAHO 434 (1992) (as modified). In contrast, respondent's 85 violations recited in Count II and its four (4) infractions contained in Count III will be treated as marginally less serious than those reported in Count I. Thus, the monetary penalties for all three (3) counts shall be aggravated based upon this criterion, although less so for those 89 violations enumerated in Counts II and III.

4. Involvement of Unauthorized Aliens

The fourth element to be examined consists of determining whether any of the individuals involved were unauthorized aliens. 8 U.S.C. § 1324a(e)(5).

Complainant maintains that "Respondent has admitted that 6 aliens were arrested at its place of business on December 16, 1993," and "respectfully avers that the presence of these unauthorized aliens is a serious aggravating factor."

Respondent's counsel did not address this factor in its motion regarding civil money penalties.

Because respondent has admitted that six (6) aliens were arrested on its business premises on December 16, 1993, and because complainant has submitted records of sworn statements for each of those six (6) aliens, verifying that each one had been employed by respondent, it is proper to aggravate the civil money penalties for the corresponding violations associated with those individuals in Counts I and II. Complainant's First Req. Admis. at 3 (Req. No. 9 & Ex. 7); see United States v. Ricardo Calderon, Inc., 6 OCAHO 832, at 6 (holding that the penalty as to nine (9) of the violations should be increased because the record had revealed that nine (9) out of 30 employees were illegal) (citing United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 8 (1993) (finding that, because at least seven (7) of respondent's employees were unauthorized, seven (7) of the 87 infractions at issue should be aggravated); United States v. Alaniz, 1 OCAHO 297, 1969 (1991) (stating that a showing that several of respondent's employees had admitted to being unauthorized aliens was sufficient to warrant aggravation as to all the paperwork violations); United States v. Camidor Properties, Inc., 1 OCAHO 299, 1982 (1991) (indicating that aggravation of the penalty for the single employee who was determined to be an illegal alien was appropriate)).

5. History of Previous Violations

The fifth and concluding criterion to be considered is whether the respondent has a history of previous violations. Respondent asserts that "[t]he record is abundantly clear that the Respondent has not had any prior IRCA violations and therefore is entitled to full mitigation of penalty in this regard." Mot. Denial Reduction Complainant's Req. Civil Money Penalties at 6. Complainant does not address this factor, and it can be assumed that INS concedes that respondent has no history of previous violations.

Therefore, respondent is entitled to mitigation of the proposed civil money penalties based on this factor.

In summary, respondent is entitled to mitigation of the proposed civil money penalties based upon two (2) of the five (5) criteria namely, the size of its business and also upon a showing that respondent has not been involved in prior violations.

The pertinent employment verification provisions of IRCA impose employers a duty to inspect and verify employment eligibility documents presented after November 6, 1986, during the hiring process, and also dictate that employers not hire individuals who are not authorized to work in the United States.

As part of its compliance regime, IRCA provides for civil money penalties to be levied against employers who fail to comply with its paperwork provisions, 8 U.S.C. § 1324a(e)(5), with such penalty sums ranging from a statutorily mandated minimum of $100 to a maximum of $1,000 for each violation. Id. Imposition of civil money penalties deters repeat infractions of IRCA by the cited employer, while concurrently encouraging compliance by other employers. See United States v. Ulysses, Inc., 3 OCAHO 449, at 8 (1992).

"INS is tasked with enforcing the provisions of IRCA, and is accorded broad discretion in assessing penalties for violations of this type." United States v. Ricardo Calderon, Inc., 6 OCAHO 832, at 7 (1996). Such flexibility allows INS to consider the particular facts of each case when levying an appropriate penalty sum. Id. IRCA also grants broad discretion over penalties to the administrative law judge in charge of the case. 8 U.S.C. § 1324a(e)(5).

As previously held in the November 7, 1995 Order Denying Respondent's Motion to Reconsider and Partially Granting Complainant's Motion for Summary Decision, and in the April 1, 1996 Order Granting Complainant's Motion to Deem Admitted Its Second Request for Admissions and Its Motion for Summary Decision, it is found that respondent violated the provisions of IRCA in the 135 specific manners alleged in Counts I, II and III of the Complaint.

In view of the foregoing, it is readily apparent that in having demonstrated that respondent had violated the paperwork provisions of IRCA in the 135 ways alleged, the minimum civil money penalty sum which complainant could have assessed was $13,500, or the statutory mandated minimum amount of $100 for each proven infraction.

Complainant could have imposed the maximum sum of $135,000 for these infractions. It proposed civil penalties totalling $41,000, instead, or an average of $303.70 for each violation.

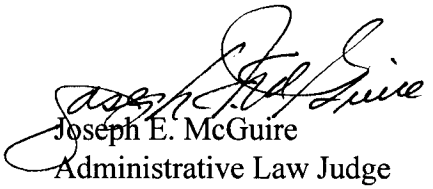
Given the fact that it has been demonstrated that respondent is entitled to mitigation of the proposed civil money penalty sums on only two (2) of the five (5) statutory criteria and that it has also been shown that its civil money penalty sums should be increased based upon the remaining three (3) statutory factors, this record fails to disclose that complainant has acted unreasonably or that it has abused its discretion in assessing these civil money penalty sums.

That because in having assessed civil money penalty sums averaging $303.70 for each violation, or $202.70 in excess of the mandated minimum amount, INS moved upwardly only some 22.63% on its discretionary $900 civil money penalty spectrum in having done so.

Given that circumstance, it is also readily discernible that respondent has not been treated unfairly under these facts, nor has INS abused its enforcement discretion in having levied these assessments.

Order

Having determined that respondent violated the paperwork provisions of 8 U.S.C. § 1324a in the manners described in the three (3)-count Complaint at issue, it is ordered that the total civil money penalty sum for the 135 proven violations is $41,000, as previously assessed.



Joseph E. McGuire
Administrative Law Judge

Appeal Information

This Decision and Order shall become the final order of the Attorney General unless, within 30 days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondents, in accordance with the provisions of 8 U.S.C. §§ 1324a(e)(7), (9) and 28 C.F.R. § 68.53 (1995).

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 1996, I have served copies of the foregoing Final Decision and Order to the following persons at the addresses shown, in the manner indicated:

Office of Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041
(original hand delivered)

Dea Carpenter, Esquire
Associate General Counsel
Immigration and Naturalization Service
425 "I" Street, N.W., Room 6100
Washington, D.C. 20536
(one copy sent via regular mail)

D. Reeves Carter, Esquire
Immigration & Naturalization Service
P.O. Box 2669
New York, New York 10008-2669
(one copy sent via regular mail)

Henry Kohn, Esquire
Chemical Bank Building
5005 13th Avenue
Brooklyn, New York 11219
(one copy sent via regular mail)

Cathleen Lascari
Legal Technician to
Joseph E. McGuire
Administrative Law Judge
Department of Justice
Office of the Chief Administrative
Hearing Officer
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041
(703) 305-1043